

**Claim Rejections:**

The newly added and amended claim eliminates the objections made by the Examiner by the applicant specifically limiting claims so that the claims distinguish over the references cited. Specifically the claims eliminate the use of any of the requirements of Galloway and provide a superior advancement in the art of analysis of specimen using a uniquely shaped (delta) cup. This places the application in condition for allowance.

For all of the above reasons, applicant submits that the specification and claims are now in proper form, and that the newly deleted added claims 1-5 all define patentably over the prior art. Therefore the applicant submits that this application is now in condition for allowance, which action is respectfully solicited.

**The Claims Rejection Under 35 USC § 102**

The newly deleted, amended and added claims have overcome the Examiners rejection of claims 1-4 under 35 U.S.C. 102(e) as being anticipated by Galloway by deleting the claims and adding a claim that is fully disclosed and enabled by the specification. This reference describes a method which requires tilting (this is known by the applicant from actual use of the device of Galloway). The device also leaks profusely for the collecting and testing fluid using a plunger (spike) that is dangerous to the user. The applicant would urge the examiner to use any of the examples as taught in the present specification and find the same example in any of Galloway specification. This is patentably distinct and "novel" in structure and functionality over the Galloways device. Because of this and other reasons the Smith device is not limited to all of the requirements of the Galloway device as stated by the Galloway claims.

Rejection to newly added and deleted claims 1-5 as being anticipated by Galloway under 35 U.S.C. § 102 should be reversed because Galloway does not teach applicant's limitations as claimed, i.e., three sided delta shape device that allows for more than 4 or 5 assays as allowed by Galloway but photocopying from all side of the device. Therefore, Galloway fails the first step of inquiry with respect to a 35 U.S.C. § 102

rejection anticipation reference. See *In re Spada*, 15 USPQ 2d 1655, 1656 (CAFC 1990) where the Court of Appeals For the Federal circuit stated, "Rejection for anticipation or lack of novelty requires, as the first step in the inquiry, that all elements of the elements of the claimed invention be described in a single reference." In addition, the Court stated, "Further, the reference must describe the applicant's claimed invention sufficiently to have placed a person of ordinary skill in the field of the invention in possession of it." The device of Smith uses a "new principle of operation" in that include the use of a device with a device that does not need to be tilted and has 3 unique sides for multiple advantages.

As the Appellant and other courts have cited, hindsight view of prior art is not allowable. As the Courts have stated, "It is impermissible to use the claimed invention as an instruction manual to "template" or piece together the teachings of the prior art so that the claimed invention is rendered obvious. This court has previously stated that one cannot use hindsight construction to pick and choose among isolated disclosures in the prior art to depreciate the claimed invention." *in re Fritch supra*, 1784.

Thus the applicant submits that the present invention clearly recites novel physical subject matter which distinguishes over any possible use of Galloway.

**The Novel Physical features of newly added Claim 5 which Produces New And Unexpected Results And Hence Are Unobvious And Patentable Over The Reference Under § 102.**

**Conclusion**

For all of the above reasons, applicant submits that the specification and claims are now in proper form, and that the claims all define patentably over the prior art. Therefore the applicant submits that this application is now in condition for allowance, which action is respectfully solicited.

**Conditional Request For Constructive Assistance**

Applicants have amended the specification and claims of this application so that they are proper, definite, and define novel structure which is also unobvious. If, for any reason this application is not believed to be in full condition for allowance, applicant respectfully requests the constructive assistance and suggestions of the Examiner pursuant to M.P.E.P. § 107.03(d) and § 707.07(j) in order that the undersigned can place this application in allowable condition as soon as possible and without the need for further proceedings.

Very Respectfully Submitted,



Jack V. Smith

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**Certificate of Facsimile Transmission**

I certify that on the date below I will fax this communication, and attachments if any, to Group 1743 of the Patent and Trademark Office at the following number: (571)273-8300

Date: 10/08/2007

Note: (the October 6<sup>th</sup> 2007 fell on a Saturday so the allowable time is extended to Monday the October 8<sup>th</sup> 2007.

Inventor's Signature: \_\_\_\_\_

Jack V. Smith